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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. .....

CHARLES ETTA COX .....*Petitioner*

v.

STATE OF ARKANSAS .....*Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Charles Etta Cox, hereby petitions for a writ of certiorari to review the decision of the Supreme Court of the State of Arkansas entered on April 16, 1973 affirming her conviction of the crime of grand larceny despite the conviction being based upon evidence obtained as the result of a constitutionally illegal search and seizure when arrested without probable cause.

OPINION BELOW

The opinion of the Supreme Court of Arkansas is reported at: *Cox* vs. *State*, 254 Ark. —, 491 S.W. 2d 802 (1973). A copy of the opinion is printed in Appendix "A" to this petition.

JURISDICTION

The opinion of the Supreme Court of Arkansas was rendered on March 12, 1973. That Court entered final judgment upon denying rehearing April 16, 1973, a copy of which is printed in Appendix "B". The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. 1257 (3).

To comply with Rule 23 (1) (F) of this Court, we submit the following account of how the federal question herein presented was raised.

The question of an illegal search and seizure without probable cause in violation of her rights under Amendments Four and Fourteen of the United States Constitution and of Article 2, Sec. 15 of the Constitution of the State of Arkansas were presented and raised in the appeal to the Supreme Court of Arkansas, and was discussed in that Court's opinion affirming petitioner's conviction in Appendix "A".

QUESTION PRESENTED

1. Whether petitioner's detention by the Arkansas State Police was based on probable cause and, if not, whether the warrantless search and seizure incident to that detention were also illegal, thereby preventing the use of the fruits thereof as evidence at petitioner's trial on February 28, 1972.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT 4 TO U.S. CONSTITUTION:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14 (1) TO U.S. CONSTITUTION:

* * * nor shall any state deprive any person of life, liberty, or property, without due process of law * * *

ARTICLE 2, SECTION 15 TO CONSTITUTION OF ARKANSAS:

The right of the people of this State to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized.

STATEMENT OF THE CASE

Petitioner and two other women were stopped by an Arkansas State Trooper in response to a radio call and taken into custody for investigation of "shoplifting" (R. 32). Petitioner and the other two occupants of the vehicle were detained and two cloth bags were removed from the vehicle and searched, without a search warrant, which bags contained items later identified as stolen merchandise. After the warrantless search and the identification of the stolen merchandise, the petitioner was arrested and charged with larceny (R. 83).

The trial court, prior to trial, denied petitioner's Motion To Suppress Evidence (R. 38).

The Arkansas Supreme Court affirmed petitioner's conviction by holding that "Warrantless search of an automobile held justified where arresting officer had received a radio communication about the stolen merchandise and described the suspects and car, and when the officer stopped the car saw the merchandise in plain view, and the exigencies of the situation required instantaneous action to preserve the existence of the evidence sought to be seized", and "The right to search and the validity of the seizure are not dependent upon the right to arrest but on the reasonable cause the seizing officer has for believing that the contents of the automobile offend against the law". (Appendix "A").

REASONS FOR GRANTING THE WRIT

The decision of the Supreme Court of Arkansas in the instant case is not in accord with the applicable decisions of this Court in refusing to reverse petitioner's conviction when she was taken into custody, without a warrant, for investigation of "shoplifting" and a warrantless search made of the petitioner's vehicle without probable cause.

When an arrest is made without a warrant for an offense not committed in the presence of the arresting officer, the officer's good faith is not enough. He must have a real belief that the person arrested is guilty of a felony, and that belief must be based upon reasonable grounds. Probable cause to believe that a felony has been committed is not enough, without probable cause to believe that the person to be arrested is the guilty party. Mere suspicion is not enough to constitute probable cause for arrest without a warrant, especially if it is mere general suspicion.

At the time of the warrantless search the petitioner was only under investigation (R. 34) and had not been officially charged with any offense. Petitioner was formally arrested only after a warrantless search by the officers and the identification of merchandise by the merchant (R. 83).

The detention of petitioner for investigation without a warrant and without probable cause to believe that the suspect had committed a felony was tantamount to an arrest.

In *Beck* v. *Ohio*, 379 U.S. 89, 13 L. Ed. 2d 142, 85 S. Ct. 223 (1964), this Court held that:

> "Whether an arrest without a warrant is constitutionally valid depends upon whether, at the moment the arrest was made, the officers had probable cause to make it, that is, whether at the moment the facts and circumstances within his knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense".

Petitioner's Motion To Suppress Evidence should have been granted by the Trial Court.

A Motion To Suppress Evidence illegally seized was

filed on behalf of petitioner (R. 19) and overruled by the Trial Court (R. 39).

At the hearing on the Motion To Suppress, the State, Officer Hale and the Court seemed to place a great reliance upon what is commonly referred to as the "Plain View Rule". The officer testified that the petitioner was not under arrest (R. 34), that he had no search warrant at the time he searched the car (R. 32), however, one was later issued and a more thorough search of the vehicle was made (R. 33).

The proceeding by search and seizure is a drastic one. Its abuse led to the adoption of the Fourth Amendment and this, together with legislation regulating the process, should be liberally construed in favor of the individual. See, *Segro* v. *United States,* 287 U.S. 206.

General searches have long been deemed to violate fundamental rights under the Fourth and Fourteenth Amendments of the United States Constitution and Art. 2, Sec. 15 of the Constitution of the State of Arkansas. See *Marron* v. *United States,* 275 U.S. 192, 195, 196; 48 S. Ct. 74; 72 L. Ed. 231.

As the Maryland Court of Special Appeals emphasizes in *Brown* v. *State,* Md. Spec. Ct. App., July 3, 1972, "there is more to the plain view doctrine than meets the eye". There the police officers were legally present in a house for the purpose of obtaining information for a search warrant. *The officers were invited into a boarding house by the landlady and in looking through the open door of a suspect's room they observed a box containing what they believed to be stolen goods "right in plain view" just inside the door.* (Emphasis supplied)

The Court held that while the open view observation of the stolen goods furnished probable cause for the issuance

of a warrant, no exigent circumstances justified a warrantless entry into the room. *The suspect was in custody and the room could be secured until a warrant could be obtained.* (Emphasis supplied) This is a parallel to the instant case as the petitioner was in custody and a warrant could have certainly been obtained, as one ultimately was obtained, prior to seizure of the merchandise.

In *Coolidge* v. *New Hampshire,* 403 U.S. 443, the Court recognized at the outset that the use of "Plain View" as descriptive phrase is not coterminous with its use as a legal concept. The first condition precedent to a "Plain View" seizure is a justifiable prior intrusion.

The Plain View doctrine does not contemplate the preintrusion visual observation of evidence in "Open View" inside a constitutionally protected area, such as a house, garage, automobile, etc., from a vantage point outside the "constitutionally protected area". *Here the valid visual observation simply furnished probable cause for the issuance of a search warrant, Steel* v. *United States,* 267 U.S. 498. As a non-search, the visual observation itself is legitimate; *but it may never, standing alone, justify an intrusion, Taylor* v. *United States,* 28 U.S. 1. (Emphasis supplied)

In *Jones* v. *State,* 246 Ark. 1057, the petitioner here urges the Court to seriously review Mr. Justice Byrd's concurring opinion, especially the second paragraph on page 1073. In citing numerous opinions of the United States Supreme Court, Mr. Justice Byrd points out that a search without a warrant as an incident to a lawful arrest has been approved only (1) where the arrest was made within the premises; (2) where the search was necessary to seize weapons or other things which might be used to assault the officers; or (3) where the search was necessary to prevent the destruction of evidence. Petitioner submits that none of the fore-

going elements existed at the time the two pillow cases were removed from the vehicle which she was driving.

The Arkansas Supreme Court more or less reiterated the foregoing in *Steel* v. *State,* 248 Ark. 159, 450 SW 2d 545.

The petitioner's detention, warrantless search and seizure violated her constitutional rights under the Fourth and Fourteenth Amendments to the United States Constitution and Article 2, Section 15 of the Constitution of Arkansas, and the evidence secured should have been suppressed and excluded from the trial.

CONCLUSION

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

R. W. LASTER
Suite 820
Three Hundred Spring Building
Little Rock, Arkansas 72201

Counsel for Petitioner

APPENDIX "A"

SUPREME COURT OF ARKANSAS

No. 5802

Opinion Delivered March 12, 1973

CHARLES ETTA COX *Appellant*

v.

STATE OF ARKANSAS *Appellee*

Appeal from Grant Circuit Court
Henry B. Means, Judge
Affirmed
Carlton Harris, Chief Justice

On September 1, 1970, appellant, Charles Etta Cox, was arrested in Grant County, Arkansas, and charged by Information with Grand Larceny. Preceding her trial on February 28, 1972, a hearing was conducted on her motion, earlier filed, to suppress certain evidence. Appellant called one witness, Trooper James Hale for this hearing, although the motion had raised issues relating to the absence of a search warrant, the absence of probable cause to justify the arrest, the unreasonableness of the search, and the authority of the officers to seize the property which was involved. The court denied the motion, and the case proceeded to trial; at the conclusion of the evidence, the jury retired and found appellant guilty, fixing her punishment at ten years confinement in the Arkansas Department of Correction. From the judgment so entered, appellant brings this appeal. Trooper Hale, in chambers, testified that he received a radio report from Deputy Sheriff A. J. Pitts concerning suspected shoplifters, the deputy giving a description of the occupants of

the car, and the automobile in which they were riding. The officer stopped a 1956 Mercury which conformed to the description given and which was occupied by three black female adults and two children, on Highway 270 in Grant County, travelling toward Pine Bluff. Two bags[1] were in sight on the floorboard on the right hand side of the front seat, and were open at the top, disclosing merchandise, including clothing. The car was being operated by appellant and the trooper directed that it be driven back to Sheridan. The bags were taken out of the car and subsequently, after acquiring a search warrant, the car was thoroughly searched, but no additional contraband found.

The property taken from the car was offered as exhibits. The court asked the trooper if the bags described were in open view to him, to which Hale responded "They were. They could be seen from the outside of the vehicle." The motion to suppress was denied. Hale subsequently testified that the car was stopped between 5:00 and 6:00 P.M. and that the automobile was being driven by appellant. An older woman was sitting in the front with her and a younger woman was in the back seat with the children. After arriving back at Sheridan, Mrs. Olga Winkle, the owner of the store, identified the merchandise as coming from her store. She testified that the value of the property was One Hundred and Four Dollars and a few cents.[2] Barbara Pruitt, employed at the store by Mrs. Winkle, testified that on September 1 she was the only clerk in the store, had several customers, and three black women came in, mingled around in the store, then all separated, going to different places in the store, and, according to the witness, stayed quite a while. She identified appellant as one of the persons in the store. She said that she asked them several times if she could help and "when they

[1]These were pillow cases.

[2]The merchandise was subsequently returned to Mrs. Winkle and placed in stock.

finally left I got to checking around and found a box, you know, that had been merchandise, had been taken out of it and the box thrown under the counter." This box had contained lingerie. She said the women made no purchases.

Barbara Bradshaw operates a beauty shop across the street and she stated that Mrs. Winkle was in the shop having her hair fixed. She noticed a red and white 1955 or 1956 Mercury stopped in the front, noticing it because a small child kept honking the horn. Subsequently, around 5:00 or 6:00 P.M. she saw the same automobile parked in front of the store. Mrs. Winkle testified that, while sitting in the beauty shop, she observed the automobile and saw three black women get out of the car and go into her store. Subsequently, the persons returned and she saw appellant, who appeared to be carrying a shopping bag, get into the car and drive off. Upon returning to her establishment, she was shown the empty box which had contained merchandise just received.[3] Thereupon, she called Deputy Sheriff Pitts and described the car to him. Later in the afternoon, she identified appellant as the person who got into the car while she (the witness) was in the beauty shop, and she identified appellant at the trial as the same person. Mrs. Winkle stated that when she arrived in the evening, the car was being unloaded and the officers brought in pillow cases full of merchandise and a lot of merchandise fell out of one of the containers.[4]

Deputy Pitts, relative to receiving information, testified:

"I believe she called in by phone and told me what had happened about a shop lifting. She thought she had been shop lifted over there and she had information the type car and occupied by people and described them to

[3]This particular box contained a negligee set valued at $13.95.

[4]Articles taken included negligee set, a suit, two dresses, bras, and panties.

me and I in turn gave it to Trooper Hale to be on the lookout for this vehicle."

The deputy stated that when the car was driven back to the courthouse, permission was sought to look in the vehicle and they were told it was all right. He said tags were still on the merchandise. Sheriff Lewis Shirron also testified that the merchandise was new, still had the tags, sizes, etc., and he identified appellant as being present. When the merchandise was identified by the owner, appellant was arrested and subsequently charged with grand larceny.

It is first argued that appellant's motion to suppress should have been granted, appellant contending that the evidence was illegally seized, it being stated that she was not under arrest at the time and that there was no search warrant when the property was taken from the car. Appellant asserts that the court apparently relied upon what is commonly referred to as the "plain view rule", but that this rule cannot be relied upon in the present instance. Appellant cites *Coolidge* v. *New Hampshire*, 403 U.S. 443, 29 L. Ed. 2d 564, as pointing out that the use of "plain view" as a descriptive phrase is not coterminous with its use as a legal concept and that before this doctrine comes into effect, there must be a justifiable prior intrusion. Appellant argues that though the visual observation was legitimate, it did not justify the intrusion itself, but only furnished probable cause for the issuance of a search warrant. Actually, in *Coolidge*, the court held there were no exigent circumstances justifying the warrantless search of a car there involved, and it was pointed out that the "plain view" theory did not apply where the police had ample opportunity to obtain a valid warrant, knew in advance the car's description and location, had every intention of seizing it when they entered upon the petitioner's property, and no contraband or dangerous objects were involved. A contrary result was

reached in *Ker* v. *California,* 374 U.S. 23, 10 L. Ed. 2d 726; *Chambers* v. *Maroney,* 399 U.S. 42, 26 L. Ed. 2d 419; and *Warden* v. *Hayden,* 387 U.S. 294, 18 L. Ed. 2d 782. In these cases, a warrantless search and seizure of evidence was approved because of the exigencies of the situation. In *Chambers,* a warrantless search of a car was made, resulting in a seizure of evidence. This car at the time, had been taken to a police station, but the court noted that it could have been searched on the spot where it was stopped since there was probable cause to search and it was a fleeting target for a search. The court added that the probable-cause factor was still in existence at the station house and it was commented that the mobility of the car was still present; the court said that in terms of practical consequences, there was little to choose between an immediate search without a warrant, and the car's immobilization until a warrant was obtained. "Given probable cause to search, either course is reasonable under the Fourth Amendment." In this opinion, the court also stated:

> "In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In *Carroll* v. *United States,* 267 U.S. 132 (1925), the issue was the admissibility in evidence of contraband liquor seized in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize."

However, in *Ker* the court upheld a warrantless search and seizure of evidence because of exigent circumstances at a

home; likewise in *Warden,* the court upheld an entry into a suspect's house and a subsequent warrantless search because "the exigencies of the situation made the course imperative."

What are the circumstances in the case before us? Officer Hale had received a radio communication from a deputy sheriff of Grant County that merchandise was suspected to have been taken at Olga's Fabrics and Fashions Store, and the suspects were described, along with a description of the automobile. The officer observed such a car, stopped it, saw the sacks or pillow cases on the front floorboard, partly open, and articles of merchandise and wearing apparel were observed by the officer while standing outside the vehicle. Certainly this is a matter of evidence appearing in "plain view"; likewise, it would appear, with the information that Hale had received, that he had justification for stopping this automobile and upon observing the merchandise on the floorboard, ordering the car driven back to Sheridan. To first have obtained a warrant would mean, of course, that the occupants of the car could have driven on, with full opportunity to dispose of the merchandise in the vehicle. In other words, there was complete justification for an intrusion (considering the detention of the car as an intrusion). These were exigent circumstances requiring instantaneous action to preserve the existence of the evidence sought to be seized.

Appellant argues that the primary essential element in a warrantless search and seizure is that such a search is incidental to a lawful arrest; that appellant has not been arrested, was not arrested until after the seizure of the articles, and such seizure was accordinly unlawful. We do not agree with this argument. In *Carroll* v. *United States, supra,*[5] the

[5]This court has relied on the rationale of *Carroll* in numerous cases. For instance, see *Tygart* v. *State,* 248 Ark. 125, 451 S.W. 2d 225 (1970), cert. denied, 400 U.S. 807, 27 L. Ed. 2d 36; *Moore, et al* v. *State,* 244 Ark. 1197, 429 S.W. 2d 122 (1968), cert. denied, 393 U.S. 1063, 21 L. Ed. 2d 705 (1968); and *Burke* v. *State,* 235 Ark. 882, 362 S.W. 2d 695 (1962).

court stated "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." We have already stated that Hale was justified in the intrusion, and he certainly had reasonable cause to believe that the contents of the automobile offended the law.

It is next asserted that appellant's motion for directed verdict should have been granted at the close of the State's testimony as there was insufficient evidence to convict her of the crime of grand larceny. Appellant correctly points out that this court has held that where circumstantial evidence alone is relied upon to establish guilt of one charged with a crime, such evidence must exclude every other reasonable hypothesis than the guilt of the accused. Appellant then states that the most logical "reasonable hypothesis" in the case before us is that either or both of the women with Charles Etta Cox stole the merchandise, since both of them pleaded guilty.[6] It is argued that the containers holding the merchandise were on the floorboard near the right hand front seat of the car and there is no testimony that the bags were in the custody of, or under the control of, the appellant. It is true that no witness saw appellant take the merchandise, but we do not agree that it can be said that Charles Etta Cox did not have possession. Appellant certainly was in control of the automobile since she was driving it; the merchandise was in the automobile. It will be remembered also, that Mrs. Winkle, who was having her

[6]Appellant herself twice pleaded guilty. On September 24, 1970, she entered a plea and was sentenced to a term of ten years in the penitentiary, with seven years suspended. Thereafter, a motion was filed by her then attorney to set aside her plea of guilty because she was not aware of the severe nature of the crime to which she pleaded guilty and the court granted this motion. On January 12, 1971, she again entered a plea of guilty and received the same sentence. Thereafter, her present attorney filed a motion to vacate the sentence under Criminal Procedure Rule I, alleging that her rights under the Federal and State Constitutions had been violated and asking that her sentence be vacated and the Circuit Court granted that motion. The case thereafter proceeded to trial on February 28, 1972.

hair fixed in the beauty shop, testified that she observed appellant carrying what appeared to be a shopping bag, and saw her get into the car and drive off. It is stated by counsel for the State that research has not disclosed any Arkansas cases dealing specifically with stolen property found in vehicles, but authority from other states is cited, and the rationale appears to be entirely logical. In *Lawson* v. *State*, 82 So. 2d 812, the 2nd Division Court of Appeals of Alabama, in affirming a conviction of grand larceny, stated:

> "Possession is not limited to actual manual control upon or about the person. If under one's power and dominion the thing is possessed. That the appellant had knowledge of the presence of the stolen groceries can reasonably be inferred from his possession and control of the truck. Certainly, it was for the jury to so determine in the absence of any evidence by the appellant tending to justify his technical possession of the groceries."

In *Mason* v. *State*, 262 A. 2d 576 (1970), the Court of Special Appeals of Maryland sustained the conviction of one who was driving a car containing stolen license plates. Two other men were also in the car at the time of the arrest. The court stated that appellant's presence in, and driving of the automobile, were sufficient to raise the inference that he was a thief and the court then said, "Appellant in no way refuted the inference and his conviction therefore must stand." Of course, in Arkansas, the possession of recently stolen property, if not explained to the satisfaction of the jury, is sufficient to sustain a conviction of larceny. *Hammond* v. *State*, 232 Ark. 692, 340 S.W. 2d 280. To paraphrase the language in the cases cited, it certainly can reasonably be inferred from appellant's possession and control of the automobile, that she had knowledge of the presence of the stolen merchandise (which after all was only two or three feet away from her). Let it be remembered that appellant

in no way refuted the inference that she was in possession of the property. As long ago as 1900, in the case of *Lackey* v. *State*, 67 Ark. 416, 55 S.W. 213, in an opinion by Justice Riddick, this court stated that the doctrine of reasonable doubt applied to the general issue of guilty or not guilty, but that it does not apply to each item of testimony or to each circumstance tending to show the guilt of the defendant. The proof on behalf of the State was ample to make a jury question, and it was the function of that body to pass upon the matter.

Finally,it is asserted that the court committed error in refusing to give appellant's requested Instructions No. 1 and No. 2. The first told the jury that the defendant was presumed to be innocent throughout the trial and that the State must prove her guilt beyond a reasonable doubt. The second questioned instruction defined reasonable doubt. We find no merit in either contention since the subject matter in both instructions was clearly covered, and even more comprehensively, by the court in other instructions given to the jury.

On the whole case, finding no error, the judgment is affirmed.

It is so ordered.

APPENDIX "B"

STATE OF ARKANSAS

In the Supreme Court SCT.

BE IT REMEMBERED, That a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the 2nd day, being the first Monday of October, A. D. 1972, amongst others were the following proceedings, to-wit:

On the 16th day of April, A.D. 1973, a day of said term

Charles Etta Cox — Appellant
v. No. 5802
The State of Arkansas — Appellee

Appeal from Grant Circuit Court

Petition for rehearing is denied.

IN TESTIMONY, That the above is a true copy of the order of said Supreme Court, rendered in the case therein stated, I, Jimmy H. Hawkins, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of Said Supreme Court, at my office in the city of Little Rock, this 30th day of May, A.D. 1973.

Jimmy H. Hawkins
Clerk

(Seal)